

refused without any just excuse on the part of the husband. On the facts of this case, in my opinion, there was wilful refusal on the part of the husband to consummate the marriage.

The view I take in this case is supported by the decision in *Jodla v. Jodla*.⁽¹⁾ In that case the parties entered into a ceremony of marriage at a register office. They were both Roman Catholics and fully appreciated that their faith did not countenance matrimonial relations between them until there had been a religious ceremony which the husband therefore promised to arrange. In fact he did not arrange such a ceremony although repeatedly requested by the wife who was at all times, subject to the ceremony taking place, willing to render the husband his full matrimonial rights. On proceedings by both parties, for a decree of nullity on the ground of the other's wilful refusal to consummate the marriage it was held that by his refusal to proceed with the arrangements for the religious ceremony, the husband had given the wife just excuse to refuse to have sexual intercourse with him; that the wife's request to him to make such arrangements constituted an implied request for sexual intercourse which the husband had refused without just excuse, thereby wilfully refusing to consummate the marriage; and that the wife was therefore entitled to a decree.

In the present case I find that the petitioner's case has been proved and I grant her a decree nisi declaring the marriage to be null and void. The respondent is condemned to pay the petitioner's costs.

Petition granted.

Solicitors: *Murugason & Co.*

A MALAYSIAN REPORTS

I. INVESTMENT LTD. v. COMPTROLLER OF INLAND REVENUE

[A.C.J. (Ong Hock Sim F.J.) March 15, 1973]

[Penang — Originating Motion No. 5 of 1969]

B *Income Tax — Transfer of immovable property by company to another company in exchange for shares — Whether trafficking in immovable property — Whether profits liable to income tax — Income Tax Ordinance, 1947 s. 10(1)(a).*

C The appellant company, one of whose objects was to traffic and otherwise deal in or turn into account immovable property, had acquired certain lands and constructed a building on them. Subsequently it agreed to sell the lands and building to another company in exchange for shares in the company. The value of the shares exceeded the cost of the property and the Comptroller of Income Tax assessed the company for tax on the profits so obtained. It was urged on behalf of the appellant that the company was not carrying on the business of buying and selling property but investment business. It was contended further that this was an isolated transaction and not even an adventure or concern in the nature of trade. The Special Commissioners held that the profits were assessable to tax, as the company was carrying on the business of trafficking in land.

D *Held:* the facts of this case supported the decision of the Special Commissioners that although there was only one transaction, it was carried on with the intention of dealing with property. The appeal therefore must be dismissed.

Cases referred to:-

- E** (1) *California Copper Syndicate v. Harris* 5 T.C. 159.
(2) *Commissioner of Inland Revenue v. Livingston and others* 11 T.C. 358 at pages 542 and 543.
(3) *E. v. C.I.R.* [1970] 2 M.L.J. 118.
(4) *C.I.R. v. Reinhold* 34 T.C. 392.

CASE STATED.

Lim Ewe Hock for the appellant
T. S. Nathan for the respondent.

F **Ong Hock Sim F.J.:** This is an appeal by way of case stated against the decision of the Special Commissioners made September 19, 1968 that in transferring its property known as the I. Building to Island Hotels and Properties (M) Limited in exchange for the shares in Island and Properties (M) Limited, the appellant company was carrying on the business of trafficking in immovable property and that the profits obtained thereby by the appellant company were assessable under section 10(1)(a) of the Income Tax Ordinance, 1947 to tax.

The facts as found by the Commissioners are as follows:

H 1. The appellant company, the I. Investment Ltd., was incorporated and registered in Malaya under the Companies Ordinance 1940 to 1946 on January 16, 1962, with an authorised capital of \$500,000 divided into 5,000 ordinary shares of \$100 each. The two subscribers to the Memorandum and Articles of Association were T. S. H. and T. Y. F. (f), wife of C. M. T., who were also the first directors of the appellant company. On its formation, the following persons applied for shares in it as follows:—

T. S. H.	—	1,400 shares
C. M. T.	—	1,400 shares
T. Y. F. (f)	—	100 shares
O. S. H. (f)	—	100 shares

2. As at December 31, 1962, the issued capital of the appellant company was \$300,000, consisting of 3,000 ordinary shares of \$100 each fully paid. In 1963, the authorised capital was increased to \$5,000,000 divided into 50,000 ordinary shares of \$100 each. As at December 31, 1963, the issued share capital was \$500,000 consisting of 5,000 ordinary shares fully paid, and there was also application and allotment monies of \$500,000 received by the company in respect of 5,000 ordinary shares applied for but not yet allotted. As at December 31, 1965, the financial position was still as it was at December 31, 1963, with T. S. H. and his wife holding 50% of the shares and C. M. T. and his wife the other 50%. A
3. The appellant company acquired the lands on the dates stated below: B
 - (a) Lot Nos. 14(1), 14(2), 15(2) and 16(2), T.S. 16 N.E.D. Penang on February 2, 1962;
 - (b) Lot No. 32, T.S. 16 N.E.D. Penang, on February 10, 1962;
 - (c) Lot No. 31, T.S. 16 N.E.D. Penang, on November 11, 1962; C
 - (d) Lot No. 30, T.S. 16 N.E.D. Penang, some time in 1963. D

Lot No. 32 was purchased by the appellant company from T. S. H. and C. M. T. while Lot Nos. 14(1), 14(2), 15(2), 16(2) and 31 were purchased from other persons. It is not clear from whom Lot No. 30 was acquired or whether by purchase. All these lots were situated in one area at Penang Road, Penang. The appellant company paid a total sum of \$8,300 to 10 persons occupying old houses on the land Lot No. 32 as compensation for moving out of the land. The houses were demolished so that a building, later known as the I. Building, could be erected thereon. E
4. A written contract bearing a Stamp Office mark dated 31st March 1962 was entered into between the appellant company and certain contractors whereby the latter contracted to carry out piling works for the purpose of the construction of the building on the land acquired by the appellant company. The contractors undertook to complete the piling works by 30th June 1962. Tenders were received by the appellant company's architects from contractors, all dated May 15, 1962, for the erection of the building, which was described in the tender documents as six-storey shopping arcade and hotel building, on Lot Nos. 14(1), 14(2), 15(2) and 16(2). F
5. On August 18, 1962, there was a news item published in a Penang Chinese newspaper referring to a building in respect of which construction works had started. According to the news item, part of the building would be used by the Malayan Banking for conducting its business and the rest of the building would be turned into a hotel consisting of 50 rooms all of which were likely to be air-conditioned, and that the hotel would include a night club, a bar and a restaurant. G
6. On March 4, 1963, the appellant company entered into an agreement with another company whereby the latter contracted to erect the said building on the said lots and to complete it by October 30, 1963 at a cost of \$585,000. H
7. On June 5, 1963 there was another news item published in the same newspaper about the opening two days earlier of the Malayan Banking Penang Road sub-branch on the ground floor of the I. Building which had an escalator which was the first of its kind in Penang.
8. In about June 1962, one Low Cheh Seng, a partner in Pathe Hotel in Penang, approached T. S. H. and offered to rent the hotel rooms in the I. Building. But negotiation failed as there was no agreement reached on the rental amount.
9. The Inland Revenue Department sent a letter dated April 27, 1962 (attached to this Case Stated as Annexure C) to the secretary of the appellant company asking for certain information specified therein, and received a reply dated August 16, 1962 (attached to this Case Stated as Annexure D) from its accountants.
10. In 1963 the appellant company received \$7,044 as rents of the arcade in the I. Building.
11. On October 16, 1963, an extraordinary general meeting of the members of the appellant company was held, and at the meeting the following special resolutions were passed:—
 - "1. That the business and undertaking of the company be reconstructed and after such reconstruction to expand its business of investments in and the holdings of securities.
 2. That the company do convey its property known as Lots Nos. 14(1), 14(2), 15(2), 16(2), 30, 31 & 32 T.S. 16, N.E.D. Penang, together with the building erected thereon to Island Hotels & Properties (Malaysia) Limited in consideration of the issue of 2,846,300 shares of \$1 each in the said Island Hotels & Properties (Malaysia) Limited all credited as being fully paid.
 3. That the company execute a deed of guarantee with Island Hotels & Properties (Malaysia) Limited whereby the company undertake to complete the erection of the building now under construction on Lots 14(1), 14(2), 15(2), 16(2), 30, 31 & 32 T.S. 16, N.E.D. Penang to construct a driveway and car park and to undertake the fittings, fixtures, escalators, lifts, furnitures, telephone with P.A.B.X. equipment and all other things according to all the detailed plans and specifications, a copy of which will be annexed to the deed of guarantee in consideration of the issue of 903,700 shares of \$1 each in the said Island Hotels & Properties (Malaysia) Limited as being fully paid.
 4. That the common seal of the company be and is hereby authorised to be affixed to the agreement, conveyances and all other documents evidencing or constituting such transaction or expedient therefor."

The appellant company transferred the I. Building together with the land on which it was erected to the Island Hotels and Properties (Malaysia) Limited and made an undertaking to complete the building, and as a consideration for this the appellant company received \$3,750,000 shares of \$1 each in the Island Hotels and Properties (Malaysia) Limited. The transfer included the arcade in the building. When the I. Building was transferred to the Island Hotels and Properties (Malaysia) Limited, it was still under construction. The part of the building

from the third floor to the top floor was not completed yet, but the ground, the first and the second floors had been completed and tenants were already occupying the ground and the first floors. Subsequently, all of these shares in the Island Hotels and Properties (Malaysia) Limited were transferred by the appellant company as follows: —
1,000,000 shares to Disco Limited on 2.12.63;
1,500,000 shares to T. S. H. on 4.1.64;
1,250,000 shares to Disco Limited on 4.1.64.

There was no resolution made by the appellant company that these shares be held by Disco Limited or by T. S. H. on trust for the appellant company.

12. In 1962 the appellant company held shares in the following companies as follows: —

Eng Hoe Chan Co. Ltd.	—	\$20,000 shares
Miami Properties Ltd.	—	\$60,000 shares
Chong Thai Realty Ltd.	—	\$75,000 shares
Pan Malayan Distributors Ltd.	—	\$20,000 shares

At the end of 1963 the appellant company had transferred away all these shares in other companies.

13. Other than the International Building the appellant company has not constructed any building of a similar nature. C. M. T. was a principal shareholder in Disco Limited. T. S. H. did not have any share in it.

There is no doubt on the authority of *California Copper Syndicate v. Harris*,⁽¹⁾ the excess of the value of the shares over the cost of the property can be treated as a profit chargeable to tax in proper cases.

For the appellant company, it was contended that to be chargeable, this excess or profit must be gain or profit from trade or business within the meaning of section 10(1)(a) of the Income Tax Ordinance. On behalf of the company, it was urged that the company was not carrying on the trade or business of buying and selling property but investment business. Support for this contention, it was pointed out, was to be found in the resolution passed at the extraordinary general meeting of the appellant company on October 16, 1963 to expand its business of investments in securities. It was contended further that this was an isolated transaction and was not even an adventure or concern in the nature of trade. Even if it were, it was not a profit assessable to income tax as under our law, unlike English Statutes, "trade" is not defined to include an adventure in the nature of trade. The Special Commissioners agree that if the transaction was an adventure in the nature of trade merely and nothing more, the profits would not be chargeable to income tax because such profits would not fall within section 10(1)(a).

For the respondent however, it was contended that on the facts the transaction here was clearly a case of trafficking in lands and buildings. The declared objects of the appellant company as stated in paragraph 3(i) and (ii) of its Memorandum of Association was to traffic and otherwise deal in or to turn to

- A account immoveable property. Although there was only one transaction, the Special Commissioners were of the view that it was transaction carried out with the intention of dealing in property. The various matters connected with the erection of the building as set out in the statement of facts found by the Special Commissioners and the undertaking to complete the erection and to construct in accordance with detailed plans and specifications would support the conclusion of the Commissioners that the appellant company was in the business of dealing in land.
- B

As Lord President Clyde said in *Commissioner of Inland Revenue v. Livingston and Others*⁽²⁾ at pages 542 and 543:

- C "If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale it might be impossible to say that the venture was 'in the nature of trade'; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue. But this principle is difficult to apply to ventures of a more complex character such as that with which the present case is concerned. I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, 'in the nature of trade', is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as 'in the nature of trade', merely because it was a single venture which took only three months to complete. The respondents began by getting together a capital stock sufficient (1) to buy a second-hand vessel, and (2) to convert her into a marketable drifter. They bought the vessel and caused it to be converted at their expense with that object in view, and they successfully put her on the market. From beginning to end, these operations seem to me to be the same as those which characterise the trade of converting and refitting second-hand articles for sale. It may be that, in commercial practice relative to ships, this kind of business is not usually followed separately from the general business of ship-builders and ship-repairers. But, even so, I think it is none the less 'in the nature of trade'. The profit made by the venture arose, not from the mere appreciation of the capital value of an isolated purchase for resale, but from the expenditure on the subject purchased of money laid out upon it for the purpose of making it marketable at a profit. That seems to me of the very essence of trade."
- D
- E
- F
- G

- H The letter of August 16, 1962 (Annexure D) stated under (c), that the nature of the business conducted by the company is dealing in immoveable property and land development. The financial accounts of the appellant company described the construction costs as "work in progress" under current assets and is consistent with the description of the company's business as stated by its secretaries.

- I I have had my attention drawn to the decision of the Federal Court in *E. v. C.I.R.*⁽³⁾ In my view, the facts of this case are distinguishable. Here we are dealing not with an individual but with a company formed with the declared object of trafficking and dealing in land and buildings.

Contrary to its resolution passed on October 16, 1963 for expansion of its investment business some one million shares obtained in exchange for the property were transferred away by the appellant company

and about one month later, the rest of the shares so obtained were similarly dealt with. By the end of 1963, its holding of shares in four other companies were also transferred away.

As Lord Carmont said in *C.I.R. v. Reinhold*⁽⁴⁾ at 392:

"Certain transactions show inherently that they are not investments but incursions into the realm of trade or adventure of that nature. . . . This means that although in certain cases it is important to know whether a venture is isolated or not, that information is really superfluous in many cases where the commodity itself stamps the transaction as a trading venture and the profits and gains are plainly income liable to tax."

I therefore hold that the facts of this case justify the decision of the Special Commissioners. The appeal is dismissed with costs.

Appeal dismissed.

CHEAM SEE LOO BROTHERS v. KONG YOON CHOY & ANOR.

[F.C. (Ong C.J., Gill and Ong Hock Sim F.J.)]

March 24, 1973]

[Ipoh — Federal Court Civil Appeal No. 108 of 1972]

Landlord and Tenant — Exposure to penalty, fine or forfeiture — Whether exposure to prosecution sufficient — Discretion of court — Town Boards Enactment (F.M.S. Cap. 137) s. 105 — Control of Rent Act, 1966, s. 16(1)(k).

In this case the respondents, the landlords of certain premises, applied for possession of the premises, the claim being based on section 16(1)(k) of the Control of Rent Act, 1966. It was alleged that the respondents, the tenants, had erected a roof over an open space in the premises and had thereby exposed the respondents to prosecution under the Town Boards Enactment. It appeared that a complaint had been made to the Town Council and a reply had been received that the Council did not propose to take any action on the complaint. An order for possession having been made by the trial judge, the appellants appealed to the Federal Court.

Held, allowing the appeal: (1) for a claim to succeed under section 16(1)(k) of the Control of Rent Act, 1966, exposure to prosecution is not enough. There must be exposure to conviction and there is no exposure to conviction unless facts exist which would support a conviction;

(2) in this case, as the Town Council had decided not to prosecute, paragraph (k) of section 16(1) of the Act was not available to the landlords as a ground for recovering possession.

Case referred to:-

(1) *Hooi Chuk Kwong v. Lim Saw Choo* [1958] M.L.J. 1.

FEDERAL COURT.

T. S. Chiam for the appellants.

Datuk S. P. Seenivasagam for the respondents.

Ong C.J. (delivering judgment of the court): The appellants (or their predecessors) have been tenants of rent-controlled premises No. 16, Bibby Road, Raub, in their personal capacity for over thirty years. They formed a private limited company about 1949-1950

which continued as protected tenants of the premises. The respondents, their landlords, inherited the property from their mother about 20 years ago. The original rent was \$70 per month, later increased to \$110.

About 1962, the appellants spent \$7,000 on repairs, and in 1964 they obtained the respondents' written consent to repair and extend the roof garden at the tenants' own expense. Subsequently, as the first respondent admitted in cross-examination, the landlords asked for a four-fold increase of the monthly rent to \$450, but their demand was not acceded to. In 1967 the respondents discovered that the open space over the kitchen area had been roofed over with corrugated iron and on October 2, 1967 they gave notice through their solicitor to the appellants, complaining of a breach of the building by-laws and demanding the demolition of this roofing. A copy of this letter was sent to the Chairman of the Raub Town Council. As the notice passed unheeded by the appellants, the respondents on December 20, 1967 made a second complaint in writing addressed to the Chairman of the Raub Town Council. The first respondent admitted in evidence that in 1968 a reply was received from the Town Council saying that they would consider the matter and that in 1969 the Town Council, by letter in Malay, further replied stating that the Council did not propose to take any action on the complaint. In the result the appellants were never prosecuted by the Town Council for breach of any building by-law.

On January 18, 1969, however, the respondents gave notice terminating the appellants' tenancy on March 1, 1969 on the ground that breach of the building by-law entitled the landlords to recover vacant possession under the Control of Rent Act, 1966. Action was commenced by writ issued on June 9, 1969, the claim to repossession being based on the provisions of section 16(1)(k) of the Act, which reads:—

"(k) where the tenant or any other person occupying the controlled premises under him has committed a breach of any provision of any written law in force in the Federation relating to local authorities, or of any rule or by-law made thereunder, affecting the premises which exposes the landlord to any penalty, fine or forfeiture, and the court considers that such order or judgment should be made or given;"

On September 15, 1972, the High Court at Raub gave judgment, directing that vacant possession be delivered up to the landlords on or before February 28, 1973. The tenants' appeal was heard and unanimously allowed by us on March 12, 1973. We now give the reasons for our decision.

In his judgment the learned trial judge found as a fact that the roof was put up by the tenants in 1967 without the landlords' consent. He took note, too, of the fact that neither the landlords nor the tenants had been prosecuted by the Town Council for such breach of the building by-law. But to the question whether the tenants by their action had *exposed* their landlords to a fine, his answer was in the affirmative by virtue of the provisions of sub-section (ii) of section 105 of the Town Boards Enactment (Cap. 137). The section [omitting sub-section (iv) which is irrelevant] reads:—

"105.(i) No person shall erect or cause or permit to be erected in any house any partition, compartment, gallery, loft, roof, ceiling or other structure without having previously obtained the consent in writing of the Chairman.